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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1471

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Petitioners,

v.

NATIONAL CITIZENS COMMITTEE
FOR BROADCASTING,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR INTERVENOR-PETITIONER, THE LOUISIANA TELEVISION BROADCASTING CORP.

PAUL DOBIN
IAN D. VOLNER
Counsel for Louisiana
Television Broadcasting Corp.

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TABLE OF CONTENTS

	Page
OPENING STATEMENT	1
Opinions Below	2
Jurisdiction	3
Constitutional Provisions, Statutes and Regulations	3
Questions Presented	3
Statement of Facts	4
Argument	4
A. The Court of Appeals Has Usurped the FCC's Function by Compelling a Retroactive Ban on Cross-Ownership	4
B. The Rule Mandated by the Court Which Prohibits Existing Broadcasters From Publishing Daily Newspapers in Their Local Communities Abridges First Amendment Rights	9
CONCLUSION	14

TABLE OF CASES

Associated Press v. U.S., 326 U.S. 1 (1946)	13
Buckeye Cablevision, Inc. v. FCC, 387 F.2d 220 (D.C. Cir., 1967)	5
Carroll v. Princess Anne, 393 U.S. 175 (1968)	13

	Page
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)	6
Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973)	12
Elrod v. Burns, 427 U.S. 347 (1976)	13
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974)	11, 13
National Broadcasting Co. v. U.S., 319 U.S. 190 (1943)	6, 7
Permian Basin Area Rate Case, 390 U.S. 747 (1969)	7
Perry v. Sindermann, 408 U.S. 593	10
SEC v. Chenery Corp., 332 U.S. 194 (1947)	5, 9
Timkin Roller Bearing Co. v. U.S., 341 U.S. 593 (1951)	12
U.S. v. Storer, 351 U.S. 192 (1955)	6
Watson v. Maryland, 218 U.S. 173 (1928)	5
5 USC § 706	3, 6

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OPENING STATEMENT

This matter comes before the Supreme Court on Petition for Certiorari from a decision of the United States Court of Appeals for the District of Columbia. That decision affirmed so much of a regulation adopted by the

Federal Communications Commission ("FCC") as prospectively bans the issuance of a new television license to any applicant who directly or indirectly owns, operates or controls a daily newspaper in the same community as the proposed broadcast facility. But, the Court of Appeals went further than this: it vacated the FCC regulation which "grandfathers" most existing cross-ownership situations in an Opinion which effectively compels the Commission to require divestiture in all existing cross-ownership situations.

Louisiana Television Broadcasting Corp. urgently submits that the decision below is infected with fundamental error both in its determination that the FCC's prospective cross-ownership ban is constitutional and lawful and, more particuarly, in its unprecedented and unwarranted action compelling the FCC to impose a retroactive ban upon virtually all existing cross-ownership relationships. We support the briefs submitted on behalf of petitioner, the National Association of Broadcasters, *et al.*, which are simultaneously being submitted to this Court, and we will not burden the Court with a detailed repetition of these arguments. Rather we confine this brief to two points which we submit bear particular emphasis.

Opinions Below

The Opinion of the United States Court of Appeals for the District of Columbia Circuit is reprinted at pages 1-60 of the Appendix to the Petition for Certiorari filed by the FCC (hereinafter cited as "Pet. App.") and is reported at 555 F.2d 938. The Court's Opinion on the Commission's Motion to Stay Mandate appears at Pet. App. 161-167 and is reported at 555 F.2d 967. The Orders of the FCC which are the subject of the Court of Appeals' Decision

are reported in the *Second Report and Order* of the FCC in Docket No. 18110, 50 FCC 2d 1046 (1975) and *Memorandum Opinion and Order on Reconsideration,* 53 FCC 2d 589 (1975) and may be found at Pet. App. 61-147 and Pet. App. 148-158, respectively.

Jurisdiction

The judgment of the Court of Appeals was entered on March 1, 1977. Petitions for Writs of Certiorari were filed in this and companion cases and granted by this Court on October 3, 1977 in an Order which consolidates this case with five other cases for review. As a party to the proceeding below, Louisiana Television Broadcasting Corp. is thus a party before this Court. This Court has jurisdiction pursuant to 28 USC Section 1254(1).

Constitutional Provisions, Statutes and Regulations

The First Amendment to the United States Constitution provides in pertinent part that "Congress shall make no law . . . abridging the freedom . . . of the press . . . ."

5 USC § 706, defining the scope of appellate review of agency action, is set forth as an appendix to the brief of the National Association of Broadcasters. The regulations adopted by the FCC constitute amendments to Section 73.35, 73.240 and 73.636 of the Commission's Rules and Regulations and are reprinted at Pet. App. 114-121.

Questions Presented

We have elected to confine this brief to two questions:

1. Whether the Court of Appeals erred in substituting its judgment for that of the FCC, compelling the agency

to adopt a presumption that no existing broadcast stations affiliated with a local newspaper is in the public interest and that all must be divested.

2. Whether an FCC rule mandated by the Court prohibiting existing broadcasters from publishing daily newspapers in their local communities abridges First Amendment rights.

Statement of Facts

We adopt the statement of the case set forth in the Brief of the National Association of Broadcasters.

Argument

The Court of Appeals Has Usurped the FCC's Function by Compelling a Retroactive Ban on Cross-Ownership

As others have persuasively argued before this Court, the FCC has neither the statutory nor constitutional authority to adopt a regulation banning newspaper-broadcaster co-location. In any event, the Court of Appeals' invention and application of a "presumption" against "grandfathering" of existing cross interests imposes an impermissible straightjacket on the FCC in excess of the Court's powers. If nothing else, this portion of the decision, we submit, must be reversed, and the Commission's determination with respect to grandfathering reinstated.

1. There can be no question that, in its decision to set aside the Commission's grandfathering rules, the Court of Appeals has taken the extraordinary step of substituting its own balancing of the competing policy considerations

for that of the FCC. The Court of Appeals conceded that the administrative record "was essentially inconclusive" on the issue whether preexisting cross-ownership serves or injures the public interest. (Pet. App., p. 49.) This equipoise of evidence itself constitutes a more than adequate basis for the Commission's decision not to change its policy with respect to preexisting co-located TV-newspaper ownership. That action accords with the recognized principle that when an agency proposes to depart from long established prior policy, the adoption of a "grandfather provision" is not merely appropriate but desirable. See, *e.g.*, *Watson v. Maryland*, 218 U.S. 173, 176-77 (1928); *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 228 (D.C. Cir., 1967.)

Further, the court below expressly conceded that the FCC *had* balanced the public benefits resulting from grandfathering against the benefits assumed to flow from compulsory divestiture of existing co-located interests, and *had* set forth the reasons underlying its determination to grandfather existing cross-ownership arrangments except in egregious cases. The Commission reasoned that the inconclusive need for divestiture is outweighed by the public harm – loss of local ownership, loss of continuity in operation and economic dislocations – which would result if universal divestiture were demanded. (Pet. App. 93-94.)

Thus, this is emphatically not a case in which the agency failed to articulate the reasons for its decision, as it is required to do under the *Chenery* principle. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Nor does the Court of Appeals so hold.

Instead, the Court of Appeals asserted that it found the balancing determination made by the agency unpersuasive.

It devised a new rule that there is "a presumption against cross-ownership." (Pet. App., pp. 56-57). This rule finds no support in the Communications Act or the prior pronouncements of the FCC and the Courts.[1] It asserted that the Commission "could not have rationally concluded" that grandfathering is warranted but that "precisely the *opposite presumption* is compelled and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest." (Pet. App., pp. 56-60, emphasis added.) This constitutes a flat, unequivocal substitution by the Court of its own judgment as to the appropriate balance to be struck for that of the agency.

2. In so doing, the Court of Appeals far exceeded the scope of its powers. It is a fundamental principle that in reviewing agency actions, "the court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). At the very most, it is the Court's duty to insure that no errors of law have been committed and that the determination by the agency is supported by "substantial evidence." 5 USC 706. Indeed, in rulemaking proceedings such as the instant one, the Court's only duty is to assure itself that the procedures followed are fair, that the rule adopted is permitted by the organic act and that the agency result lies within the range of reasonableness. *Permian Basin Area Rate Case*, 390 U.S. 747 (1969). Certainly, it is plain that it is never the Court's responsibility – nor does it have the power – to replace the agency's determination "with one more nearly to its liking." *Permian Basin Area Rate Case, supra*, at 792 (1969).

[1] We may grant that diversification of ownership is a factor – indeed, an important factor – to be considered by the Commission under the public interest rubric of the Communications Act. But there is no word in the Act and there is no precedent to support the proposition that competition is or should be the sole factor governing Commission determinations. See, *National Broadcasting Co. v. U.S.*, 319 U.S. 190 (1943). Still less is there any support for the proposition advanced by the Court that diversity of voices is so paramount as to require the extraordinary application of a retroactive remedy. Indeed, the cases hold otherwise. See, *e.g.*, *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 207 (1943); *U.S. v. Storer*, 351 U.S. 192 (1955).

These limitations upon the scope of judicial review are not matters of mere procedural or legal nicety. They go to the very heart of the administrative process. The FCC reached its reasoned and documented determination to grandfather most existing cross-ownership situations only after a five-year exhaustive study; and it is the FCC – not the Court – which has the responsibility for administration and application of the regulatory program. Certainly, more than the appellate court, the FCC's selection of remedies is therefore entitled to deference. It is exactly this expertise which the clear and careful limitations upon the scope of judicial review are intended to protect and preserve. *NBC v. U.S., supra.* The decision of the court below to compel universal divestiture – without regard to the record, or the FCC's accumulated experience – cannot be reconciled with these statements of the limitations on judicial review and the reasons which underlie them.

3. In simplest terms, then, the court below has set itself up as a super-agency. In so doing, it has foreclosed the FCC from exercising its expertise entirely: under the decision below, the FCC has only two choices, one of which is illogical, the other ephemeral. On remand, the

FCC may adopt retroactive regulations entailing wholesale disruption in patterns which have developed over the past 40 years. The Court of Appeals' suggestion that this is merely a "one-time" only disruption (Pet. App., p. 54) misses the mark. At the heart of the court's reasoning is the premise that, if the adoption of a prospective ban on cross-ownership is in furtherance of the public interest, it logically follows that the preservation of an existing cross-ownership interests is contrary to the public interest. If left undisturbed, the court's reasoning means that grandfathering is impermissible in all cases in which the FCC proposes to depart from an existing and long-established policy. Moreover, the court's reasoning involves a *non sequitur*: a retroactive ban involves considerations – exactly those relied upon by the FCC – which are wholly absent in the case of a prospective ban. It is more accurate to say that the Court of Appeals' decision is illogical, than to conclude, as the Court has, that the FCC "could not have rationally concluded" that grandfathering is in the public interest.

The second alternative course open to the Commission under the decision below is more theoretical than real. In theory, at least, the agency could, on remand, forebear from any regulation of cross-ownership, thereby satisfying the Court of Appeals' notion that each of the three separate categories of cross-owners be treated equally. In fact, this course is foreclosed by the court's opinion on the Motion to Stay Mandate. (Pet. App., pp. 161-67.) All other possiblities properly within the scope of agency, not judicial, authority – an advancement of additional explanations for the decisions, reopening for consideration of additional evidence – were equally withdrawn by the court. And, all this was done on the basis of a newly minted, judicially fashioned, statement of policy which

the FCC was ordered to follow – that there is a presumption in favor of diversity commanding the imposition of a retroactive ban. Even if the Court of Appeals' policy determination were logical and sound – and, as we have shown, it is not – the court cannot permissibly straightjacket the FCC's performance of its function in this fashion. *Chenery Corp., supra.*

For these reasons, we submit that the Court of Appeals' action vacating the grandfather provisions of the rules must be reversed and the Commission's determination in adopting that rule affirmed. The remedy chosen by the Commission – grandfathering – is clearly lawful; the FCC carefully considered the competing public interest considerations; and it thoroughly articulated the reasons for the remedy it had selected in its decision. All of this is conceded by the court, which simply replaced the Commission's judgment with its own. Under a proper view of the limits of judicial review, the FCC's determination to grandfather must be affirmed.

B. The Rule Mandated by the Court Which Prohibits Existing Broadcasters From Publishing Daily Newspapers in Their Local Communities Abridges First Amendment Rights.

We submit that, on the facts of this case, the Court of Appeals' determination to impose a retroactive ban on cross-ownership of television stations and newspapers cannot be squared with the dictates of the First Amendment. Others have argued persuasively before this Court that the entire regulatory program cannot be reconciled with the First Amendment's prohibition upon governmental control "abridging the freedom . . . of the press . . . ." This is so because the regulation impermissibly conditions the grant of a

broadcast license upon a forfeiture of the right to publish a local newspaper and, conversely, penalizes publication of a local newspaper by denying any opportunity to seek a broadcast license.

The infringement of First Amendment rights is, moreover, especially acute in the court-mandated retroactive application of the ban to existing cross-ownership interests. In those cases, the regulation constitutes more than a condition upon the exercise of protected speech: existing licensee-publishers will be affirmatively compelled to elect between one of two equally protected modes of expression!

In *Perry v. Sindermann*, 408 U.S. 593, this court squarely held that the government

> may not deny a benefit to a person on a basis that it infringes his constitutionally protected interests – especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. (*Id.* at 597.)

A fortiori, if the government cannot condition benefits upon the surrender of First Amendment rights, it cannot take the even more drastic step of compelling one who would exercise those rights to choose among them. Yet, that is precisely what the Court of Appeals has, by vacating the grandfather provision, decreed in this case.

Addressing the First Amendment implications of the regulatory program only in the context of the prospective ban, the Court of Appeals did not even consider the constitutional implications of its retroactive application of

the asserted presumption in favor of diversity. In any event, the Court of Appeals' attempt to justify the infringement upon a free press is unconvincing. It asserts that because the regulations are "an attempt to enhance the diversity of information heard by the public" (Pet. App. 32), they promote First Amendment values and are therefore constitutional. This is an exact repetition of the arguments advanced (and rejected by this Court) in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In *Tornillo*, this Court stated

> At each point the implementation of a remedy . . . necessarily calls for some mechanism [of enforcement] . . . . If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment. (Id. at 247.)

Manifestly, a regulation which compels an existing co-owner to make a choice between its television station and its local newspaper facially involves "governmental coercion." It thus brings about a direct "confrontation with the express provisions of the First Amendment." *Tornillo, supra.*

Equally baseless is the Court of Appeals' conclusion that because the regulations attach to ownership, they do not constitute a burden upon speech. (Pet. App., p. 32.) Rather, the regulations directly and purposefully prohibit continued local publication by an existing licensee or alternatively command silencing of its television station. They attach to the content of protected speech as directly as an outright prior restraint. See, *Tornillo, supra.*

At the heart of the Court of Appeals' conclusion that divestitute is a constitutionally appropriate remedy lies the thought that divestiture is the only means by which the

supposed social problems and potential for abuse of cross-ownership can be resolved. But, even without regard to considerations of free speech, this Court has observed, "Divestiture . . . is not to be used indiscriminately without regard to . . . whether other effective methods less harsh are available." (*Timkin Roller Bearing Co. v. U.S.*, 341 U.S. 593, 603 (1951). The Court of Appeals' asserts that divestitute is itself a less harsh remedy in this case because the alternative is a denial of license renewal (Pet. App. 35). This is simplistic. In both instances, the existing television licensee-newspaper publisher is compelled to abandon one mode of expression in order to preserve another. And, there is a manifest alternative, adopted by the Commission but rejected by the court – *i.e.*, grandfathering – which avoids the direct governmental compulsion to choose between two modes of protected speech.

The court has thus provoked a conflict with the principles of the First Amendment. It purports to do so in the name of the First Amendment and its "values." But, the Court of Appeals' motives and determination here are thus strikingly similar to its action, rejected by this Court, in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973). As the Supreme Court there observed, the "continuing search for means to achieve reasonable regulation compatible with the First Amendment" cannot be achieved by the adoption of remedies – a compulsory right of access or divestiture – which "freeze this necessarily dynamic process into a constitutional holding." *Id.* at 132.

This is most especially true where here, as in the Fairness Doctrine case, the remedy "is too radical a therapy for the ailment . . . complained of." *Id.* 327. The Court of Appeals has mandated this "radical therapy" in the

absence of any basis that an extreme sanction is necessary or will work to achieve the social objective of diversity upon which the sanction purports to be based. The judicially fashioned remedy of divestiture does not rest upon the type of evidence which would sustain a determination under the Sherman Act or even Section 7 of the Clayton Act. Rather, there is only the naked "presumption," fashioned by the court, and the invocation of reasoning, squarely rejected by this Court in *Tornillo*, to support direct governmental intervention restricting the exercise of the First Amendment rights of the press.

The Court of Appeals has thus committed fundamental error because it rests its result on constitutionally insufficient grounds. On the facts of this case, we submit the principle articulated in *Associated Press v. U.S.*, 326 U.S. 1 (1946) – that the First Amendment does not confer an immunity from laws of general applicability – simply is not on point. This Court need not here consider whether compulsory divestiture of a protected medium of expression may be reconciled with the principles of the First Amendment in the face of a "paramount" countervailing interests. *Elrod v. Burns*, 427 U.S. 347 (1976). In this case, no showing has been, nor can it be made that there is such a paramount need. Any action, this Court has said, which curtails freedom of speech and of the press "comes bearing a heavy burden against its constitutional validity" *Carroll v. Princess Anne*, 393 U.S. 175 (1968). Certainly, as between the presumption in favor of diversity, upon which the Court of Appeals' retroactive ban is based, and the presumed constitutional invalidity of a remedy – divestiture – which compels surrender of First Amendment rights, it is plainly the latter which must prevail.

CONCLUSION

For these reasons and for those stated in the briefs of other petitioners, it is respectfully submitted that the decision of the Court of Appeals should be reversed. There is neither statutory nor constitutional authority to support the regulations promulgated by the FCC in its Second Report and Order. There is, most certainly, neither statutory nor constitutional authority for the application of a retroactive ban mandated by the Court of Appeals.

Respectfully submitted,

Paul Dobin
Ian D. Volner
LOUISIANA TELEVISION
BROADCASTING